Section 5

EXPERTS AND DAUBERT – GETTING IT IN, AND KEEPING IT OUT

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EXPERT WITNESSES

I. INTRODUCTION.

A. Since the United States' Supreme Court decided ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)** almost nine years ago, federal courts have become much more comfortable with their role of scientific gatekeeping. Judges have demonstrated that they are not intimidated by science and will give thoughtful consideration to whether a given expert should testify. Increasingly, the qualifications of experts to give a certain opinion have come under fire, and courts have responded by striking the experts in some instances. Cross-examination is not enough to rehabilitate an expert flawed by inexperience or unreliable methodology. While this is true, *Daubert* and its progeny have not given much guidance to attorneys in terms of what to expect in any certain circumstance, which explains, in part, the increase in the number of *Daubert*-based challenges.

B. Criminal defense lawyers should take great care in every step of the process, beginning with selecting an expert and ending with the presentation of their testimony at trial. Environmental cases involve highly technical issues, complex laws and regulatory schemes. Distilling the science always requires good experts. Experts are essential in aiding counsel to understand the facts and to develop a coherent trial strategy. A trial court's ruling on the admissibility of expert testimony is reviewed for abuse of discretion. Therefore, it is important to get the expert's testimony admitted in the trial court because chances of success on appeal are not good.

This paper will explore the practical considerations involved in retaining an expert as well as the development of the courts' interpretation and application of FED. R. EVID. 702. Because of the breadth of FED. R. Evid. 702, we can expect to see more litigation regarding the appropriate use of expert witnesses in environmental cases. Separating "junk science" and legal conclusions in the guise of scientific opinions will continue to be hot topics. Many trial attorneys do not appreciate the fact that experts are potential weapons. Experts can add great value to effective trial advocacy or they can be a recipe for a great disaster. This paper will also attempt to provide some guiding principles to consider when bringing or defending against *Daubert* challenges.

II. HOW TO SELECT AN EXPERT.

A. Select an expert early. A well-seasoned expert will help you develop and solidify your strategy more quickly. Plus, it will give you and the expert time to develop a well-considered opinion.

B. The type of case and status of the client often determine the selection of expert witnesses. Keep your client involved in the expert selection process.

C. Qualifications, which are being sought by an attorney, may narrow the selection process. Generally speaking, it is best to choose an expert who is qualified in the specific area about which she or he will be testifying. The more specific the qualifications, the better, in most cases.

D. What is the purpose for which the person is being engaged. Is it to testify; is it to assist the attorney as a consultant; or is it to advise present management about the conduct of a current or past employee?

E. Ability to communicate. Are there any video tapes of previous testimony that we can review to determine the expert's ability to communicate? This is crucial to presenting the evidence in a way that the jury will understand.

F. What is the staffing of the engagement going to be?

G. Cost. This sometimes overrides all other factors.

H. Below are the factors in matrix chart form, which the attorney looks for when selecting the expert.

COST	**APPEARANCE**	**LOCATION**
RESULTS	**CREDENTIALS**	**COMMUNICATION**
RESPONSIVENESS	**ADAPTABILITY**	**EXPERIENCE**

III. AVOIDING CONFLICTS.

A. Experienced expert consulting firms generally check client names, names of other parties including the attorneys on both sides to see if they have testified for or on behalf of either those entities or individuals. Ask your proposed expert to conduct such a search.

B. You should determine if your law firm or any of its partners or associates have either testified, written articles, or prepared outlines taking a position which is inconsistent to that of the client's.

C. Discuss the process of cross-examination with your proposed expert and explain how damaging a conflict of interest could be to the case and the party's credibility with the jury.

D. In addition to named parties, the expert must check to see if there are any conflicts with insurance carriers or third parties.

IV. DISCOVERY AND CONFIDENTIALITY.

A. **FED. R. CRIM. P. 16(a)(1)(E), Governmental Disclosure of Evidence:**

"At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends

to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications."

B. **FED. R. CRIM. P. 16(b)(1)(C), The Defendant's Disclosure of Evidence:**

"Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this Rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications."

C. Because discovery of information is based on whether the expert in possession of the information is expected to testify at trial rather than on the role the expert played in the preparation of the information, prudence dictates that an attorney carefully considered to whom certain pre-trial work is assigned. For instance, if tests must be performed, but there is a substantial possibility that the test will produce results that are unfavorable to the client's case, there is a strong incentive to have the test performed by the non-testifying expert. Once it has been ascertained that the results of the test are not damaging to the client's case, they may be passed on to the testifying expert to be used as a basis of the expert's opinion at trial. In some cases, it may be preferable to have the expert reduplicate the test.

D. The non-testifying expert's opinions, experiments and documents are protected under the attorney/client or work-product privilege. These privileges may be waived. For example, if the non-testifying expert produces reports which are used by management of the business, provided to third parties (insurance claims or amended tax returns) or given to authorities pursuant to a voluntary disclosure, the privilege may be waived.

E. Of course, if in-house experts are utilized or the expert does other work for the client, the privilege may also be lost, or at least, blurred.

F. Beware of government attempts to expand the testimony of lay witnesses into the expert area without giving the defendant the disclosure required under Rule 16.

G. Pay close attention to the time limits on pre-trial scheduling orders relating to disclosure of experts and their reports. Expert testimony can be excluded when counsel misses a Court imposed time deadline.

V. RULES.

A. **FED. R. EVID. 701, Opinion Testimony by Lay Witnesses:**

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a)

rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

B. **FED. R. EVID. 702, Testimony by Experts:**

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

The judge must determine whether a witness is qualified to testify as an expert FED. R. EVID. 104(a). A witness can be qualified by knowledge, skill, experience, training, or education, but it is not necessary that an expert be qualified in all five ways. FED. R. EVID.702; *see also* ***Virginia Vermiculte v. W. R. Grace*****, 98 F. Supp. 2d 729 (W. D. Va. 2000)**. The judge must also determine whether an expert's opinion is reliable. A court is not confined to the *Daubert* factors, as outlined below. Instead, there is a good degree of discretion granted to a judge in making necessary determinations regarding reliability. These two determinations of qualification and reliability will be reviewed on appeal under an abuse of discretion standard. Therefore, great deference is afforded to the trial judge.

C. **FED. R. EVID. 703, Bases of Opinion Testimony by Experts:**

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

D. **FED. R. EVID. 704, Opinion on Ultimate Issue:**

"(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

The application of this rule has caused substantial difficulty for trial and appellate courts and often creates what appears to be inconsistent results. For example, compare ***United States v. Lipscomb*, 14 F.3d 1236, 1242 (7th Cir. 1994)** ("we conclude that when a law enforcement official states an opinion about the criminal nature of a defendant's activities, such testimony should not be excluded under Rule 704(b) as long as it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes.") with ***United States v. Boyd*, 55 F.3d 667, 672 (D.C. Cir. 1995)** (reversing the conviction on the grounds that an experts' testimony violated Rule 704(b)) and ***United States v. Mitchell*, 996 F.2d 419 (D.C. Cir. 1993)** (finding that the expert's testimony violated Rule 704(b) but refusing to find reversible error).

E. **FED. R. EVID. 705, Disclosure of Facts or Data Underlying Expert Opinion:**

"The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

F. **FED. R. EVID. 706, Court Appointed Experts:**

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witnesses.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of Appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **Parties' Experts of Own Selection.** Nothing in the rule limits the parties in calling expert witnesses of their own selection."

G. The government often attempts to cloak its experts as mere summary witnesses, and therefore, resist production of its charts and summaries because these witnesses will be merely summarizing evidence. Some judges have taken the position, even after the enactment of Rule 16(a)(1)(E) that such summaries and charts do not have to be disclosed pre-trial because no one knows what evidence will or will not be admitted.

H. However, most of those decisions are based on cases which were decided prior to the amendment of Rule 16 allowing for the discovery of the witness's opinions, the bases, and the reasons for those opinions.

VI. WATERSHED CASES.

A. ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)**:

Interpreting FED. R. EVID. 702, the United States' Supreme Court declared that an expert's opinion will be admissible if the expert is qualified, if the expert have used a reliable method to reach the opinion, and if the proffered opinion is relevant to issues in the case at hand. The Court rejected general acceptance as the threshold inquiry, thereby ushering in a new era of scientific and technical testimony. The Court encouraged courts to err on the side of admissibility: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 596.

The specific factors that the *Daubert* court directed trial courts to consider in determining whether the reasoning or methodology underlying the testimony is scientifically valid were:

1. whether the expert's theory can be tested or whether it is simply a subjective, conclusory approach that cannot be reasonably assessed;

2. whether the technique is subject to peer review and publication;

3. the known or potential rate of error;

4. the existence and maintenance of standards controlling the method's operation; and

5. whether the technique is generally accepted in the scientific community.

Other courts, before and after *Daubert*, have added other factors to consider, such as:

1. Whether the testimony has been subjected to the scientific method, ruling out any subjective belief or unsupported speculation. ***Porter v. Whitehall Labs. Inc.*, 9 F.3d 607, 614 (7th Cir. 1993).**

2. Whether experts are proposing to testify about matters growing out of research they have conducted independent of the litigation or whether they have developed their opinions only for testifying. ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).**

3. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. ***General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).**

4. Whether the expert has accounted for other obvious alternative explanations. ***Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994)**.

5. Is the expert being as careful as he could be in his regular professional work outside the litigation consulting? ***Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997)**.

6. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. ***Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999)**.

B. ***General Electric Co. v. Joiner*, 522 U.S. 136 (1997)**:

The Court gives trial courts significant discretion in applying the *Daubert* factors to assess an opinion's reliability.

C. ***Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999)**:

Plaintiffs were injured when a tire blew out on their minivan. Their expert intended to testify that a defect in the tire's design or manufacture caused the blowout. The trial court excluded the expert's testimony on the grounds that it was not reliable. The Eleventh Circuit reversed, believing that *Daubert* was limited to the scientific context. The panel held that *Daubert* did not apply to the expert's testimony, which it characterized as experience-based.

The Court expanded the trial court's role as the gatekeeper to expert testimony from the scientific evidence at issue in *Daubert* to expert testimony concerning "technical" and "other specialized" knowledge. This case made it clear that experts would be measured by the standards of their own fields. The Court emphasized that trial courts have great flexibility in making the Rule 702 inquiry and that trial courts should consider the *Daubert* factors when they reasonably measure reliability. Whether or not the *Daubert* factors are or are not reasonable measures of reliability is a matter of law for the court to determine.

This case is important because it expands the scope of the *Daubert* inquiry to all technical or specialized knowledge, not simply hard scientific testimony. It also opened the door for courts to exclude expert testimony, granting considerable leeway to trial courts in making the determination. The Court seemed to back away from its dicta in *Daubert* about the power of cross-examination in favor of giving judges authority to exclude expert testimony when it would simply be a waste of time and resources.

VII. STUDY ANALYZES *DAUBERT* AFTER ONE DECADE

A. **Daubert Proves Tough on Expert Witnesses—Generally Accepted Scientific Methods May No Longer Be Accepted.**

After analyzing data from almost 400 federal district court opinions between 1980 and 1990 a RAND Study recently indicated that Federal Judges are screening expert evidence more strictly now than they did before *Daubert*, and there is no indication that it was easier to admit novel scientific evidence after *Daubert* than it was before. The data showed that judges scrutinized reliability and other factors more carefully after *Daubert* and applied stricter standards when deciding whether to admit expert evidence. Basically the data indicates the fact that a generally accepted methodology no longer suffices for evidence to be deemed reliable or admissible. This has increased challenges to the admissibility of evidence generally, including expert witnesses.
(*Litigation News*, July 2002, Vol. 27, No.5)

B. **Recent Cases Confirm Findings—Even Generally Admitted Expert Evidence May No Longer Be Accepted.**

In ***United States v. Horn*, 185 F.Supp.2d 530 (D.Md. 2002),** a federal judge in Maryland ruled that standard field sobriety tests that law enforcement officers commonly use to establish intoxication could not be admitted as direct evidence of intoxication. Horn said that the methodology underlying the tests does not satisfy Daubert. The court said, "a detailed analysis of the factual sufficiency and reliability of the methodology underlying expert testimony is required for all scientific, technical, or specialized evidence, not just novel scientific evidence. Such a re-examination, the court said, might result in the exclusion of evidence that for years has routinely been admitted under Frye.

In ***United States v. Llera Plaza*, 179 F.Supp 2d 492, reversed 188 F.Supp. 2d 549 (E.D.Pa. 2002)**, a federal judge in Philadelphia initially held that fingerprint evidence did not meet the Daubert criteria for admissibility. Although the judge later reversed himself, this is yet another example of Daubert causing courts to re-evaluate and sometimes exclude even generally accepted scientific methods.

VIII. *DAUBERT*—STATE VS. FEDERAL COURT

Daubert may be driving more plaintiffs to state court. Many states, with the exception of Ohio and Texas, still follow *Frye*, not *Daubert*. In those jurisdictions, plaintiffs have an added incentive to file suit in state court, whereas defense lawyers would prefer to be in Federal Court, where the judge, as in Daubert, serves as a gatekeeper. John B. Isbister, Baltimore, Co-Chair of the Sections Product Liability Committee.
(*Litigation News*, July 2002, Vol. 27, No.5)

IX. TREND REGARDING EXPERT TESTIMONY

Commentators have recently noted a trend since the Court handed down its decision in *Kumho Tire*. *See* David Hechler, *Daubert: Courts Toss Out Expert Testimony*, NAT'L L.J., January 7, 2002, at A20, A26. Robert Badal and Edward Slizewski, of Heller Ehrman White & McAuliffe in Los Angeles, California, completed a study of 16 post-*Daubert* cases and discovered that courts have been striking economic experts routinely for various reasons. They discovered that courts have found that experts are not qualified and/or that they are not offering relevant, reliable opinions.

The following chart summarizes Badal's and Slizewski's findings and evidences the need for lawyers to give careful consideration to selecting and preparing an expert to testify.

Recent Cases In Which Expert Economic Testimony Was Barred[1]

	Case	Date	Reason Given
1.	***Blue Dane Simmental Corp. v. American Simmental Assoc.,* 178 F.3d 1035 (8th Cir. 1999).**	6/2/99	8th Circuit rules damage expert qualified but testimony excluded because too simplistic and ignored independent variables.
2.	***In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781 (7th Cir. 1999).**	7/13/99	7th Circuit affirms that liability expert's testimony properly excluded on relevance grounds.
3.	***In re Independent Service Organizations Antitrust Litigation*, 114 F. Supp. 2d 1070 (D. Kan. 2000).**	2/16/00	U. S. District Court for the District of Kansas excludes declarations of liability experts because not qualified and methodology was not tested.
4.	***Concod Boat v. Brunswick*, 207 F.3d 1039 (8th Cir. 2000).**	3/24/00	8th Circuit excludes liability expert's testimony because he ignored relevant data and issues.
5.	***Virginia Vermiculte v. W. R. Grace*, 98 F. Supp. 2d 729 (W.D. Va. 2000).**	5/4/00	U. S. District Court for the Western District of Virginia, Charlottesville, excludes liability expert's testimony because not qualified and methodology and opinions rife with

[1] *Id.* at A26. Reproduced with permission of Mssrs. Robert Badal and Edward Slizewski.

	Case	Date	Reason Given
			error.
6.	**Seatrax v. Sonbeck International, 200 F.3d 358 (5th Cir. 2000).**	6/25/00	5th Circuit excludes damage expert's testimony because not qualified.

X. LESSONS FROM RECENT CASES.

A. AVOID LEGAL EXPERTS AND MAKE SURE YOUR EXPERT'S OPINION SMELLS GOOD.

***State of New York v. Westwood-Squibb Pharmaceutical Co., Inc.*, 2001 U.S. Dist. LEXIS 11765 (W.D. N.Y. 2001)**: In a CERCLA litigation, the court determined that one party's allocation expert interfered with the province of the court to make findings of fact and conclusions of law. The expert was a lawyer who had experience with allocation issues in environmental litigation. He offered an opinion about which party should pay for the clean-up, based on his consideration of several equitable factors. The court disallowed his testimony and noted that the court should not "devote its time and resources, as well as those of the opposing party, to a witness whose testimony might be presented with equal effect through pre-trial and post-trial briefs." *Id.* at *32.

The court went on to criticize the testimony of another expert, about the volume of fill deposited at a site, as unreliable. The expert's rates of error were somewhat high. The court was troubled, not by the high error rates, but the lack of explanation for the rates. The court made it clear that the reliability analysis focuses on methodology, not results. Instead of striking this witness, the court gave the party offering the witness a chance to cure the deficiency at trial. The final trial was set as a bench trial.

This case demonstrates a reasonable approach to the questions presented and evidences a willingness to thoroughly analyze the questions relating to expert testimony. The judge found that the second expert could not testify unless the problems with his testimony were rectified at trial, even though it was set to be a bench trial, instead of allowing it subject to cross-examination.

B. DON'T CONFUSE THE JURY.

***United States v. Riddle*, 103 F.3d 423 (5th Cir. 1997)**: The Fifth Circuit reversed the district court for admitting testimony of a government lay witness on grounds that the witness offered expert testimony but had not been designated by the prosecution as an expert pursuant to Rule 16. The expert in this case was testifying both as a lay witness and as an expert, and the court criticized the government for combining these features, and thus, confusing the jury.

C. GIVE YOUR EXPERT A GOOD FOUNDATION.

In ***United States v. Sparks*, 2001 U.S. App. LEXIS 8002 (10th Cir. 2001)**, the court excluded an expert's testimony because the documents upon which the opinion was based had not been properly authenticated. Therefore, as a matter

of evidence, make sure you can authenticate the documents and materials that your expert uses to base his/her opinion.

D. **MAKE A CLEAR, THOROUGH OBJECTION. IF YOUR MOTION FAILS, *BRADY* PROBABLY WON'T SAVE YOU.**

Defendants appealed their convictions for conspiracy to commit environmental crimes. ***United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001)**. The government's expert testified at trial about plant employees' potential exposure to hazardous substances without objection. Hansen's *Daubert* motion did not address the expert's qualifications or methodology, and Hansen did not object at trial. The Eleventh Circuit upheld the admission of his testimony. On appeal, Hansen raised a *Brady* claim that the government suppressed impeachment evidence that the expert had been discredited in four previous cases (including *Joiner*). The court rejected the claim on the grounds that: (1) there was no evidence the government was in possession of the information, (2) the cases were public record and the defense had access to them, (3) the cases all related to the expert's testimony in the context of proving causation in tort actions, and (4) Hansen could not show that there was a reasonable probability that the information would have changed the outcome of the proceedings.

E. **DISCOVERY VIOLATIONS ARE NOT A BIG DEAL, UNLESS THEY ARE PERPETRATED BY DEFENSE COUNSEL.**

Generally speaking, a party must show prejudice before successfully asking for any relief from an alleged discovery violation under Fed. R. Crim. P. 16. ***United States v. Lopez*, 271 F.3d 472, 482-83 (3rd Cir. 2001)**. The prejudice must be significant. ***United States v. Hall*, 2001 U.S. App. LEXIS 7564, *3 (4th Cir. 2001)** ("To remedy the violation [by the government], the court offered Hall's counsel for more time to prepare for cross-examination so counsel could consult with the defense expert; counsel did not request additional time to prepare."); *see also* ***United States v. Mendoza-Paz*, 2001 U.S. App. LEXIS 7762 (9th Cir. 2001)** ("Mendoza-Paz failed to demonstrate that the government's lack of timely or sufficient summaries of its experts' opinions, reasons for those opinions, and qualifications prejudiced her substantial rights under Rule 16(a)(1)(E).").

But see ***United States v. Adams*, 271 F.3d 1236, 1243 (10th Cir. 2001)** (finding that the defendant's disclosure of expert testimony three days before the trial was untimely and that a continuance to allow the government an opportunity to evaluate the defense's expert was improper).

F. **AS ALWAYS, PRESERVE ERROR. ASK FOR A *DAUBERT* HEARING.**

There is no requirement that a court have a *Daubert* hearing before an expert is qualified. ***United States v. Evans*, 272 F.3d 1069, *57 (8th Cir. 2001)** (allowing a police officer to testify as an expert about vice and prostitution investigations without holding a hearing). Nevertheless, if you have an objection to the qualifications of or methodology used by an expert, preserve your error through a written motion and request a hearing.

XI. MIRRORING HYPOTHETICALS AND RULE 704(b).

A. The government often attempts to overcome objections under Rule 704, by offering testimony by government agents (police officers, bank examiners, IRS agents, medical care experts) to hypothetical questions which mirror exactly the facts in the case and then asks for the expert's opinion concerning whether or not those facts indicate criminal activity.

B. Naturally, most of this case law first developed in the drug cases where the government attempt to frequently offer expert testimony by a law enforcement agent that defendant's conduct is typical of the modus operandi employed by a certain type of criminal activity. The evidence is usually offered to prove that the defendant intended to engage in that criminal activity.

C. In ***United States v. Boyd*, 55 F.3d 667 (D.C. Cir. 1995),** the D.C. Circuit barred the use of such hypothetical questions in drug cases. In that case, it encountered the following factual record:

"Suppose a person is on a street corner at about 6:50 p.m. around the 1600 block of Holbrook Street, N.W. Suppose that person is holding a plastic sandwich bag in his hand and displaying the contents of that plastic bag to another person. Suppose that the contents of that bag being displayed by that person are ten rocks of crack/cocaine, seven of which are packaged in individual, smaller zip locks, and three larger ones loose in the larger plastic bag. Suppose that the total weight of the actual crack/cocaine in that plastic bag being shown by the person is about 6.037 grams.

Now, finally suppose that plain clothes vice officers drive into the area. The person holding the plastic bag – as the officers pull up to that person, the person holding the plastic bag flees from the area, and within a block or two, tosses the plastic bag containing the crack/cocaine under a car in the area.

Now, given those hypothetical facts, Officer Stroud, in your opinion, is that person's possession of the mixture or substance, 6.037 grams containing crack/cocaine possession for personal use or is it consistent with possession with intent to distribute?"

Officer Stroud answered: "Possession with intent to distribute."

D. In ***United States v. Toms*, 136 F.3d 176 (D.C. Cir. 1998),** the Court stated:

"Although in earlier cases we held that an expert is permitted to state 'that certain conduct fits a specific role in a criminal enterprise—even though the conduct described exactly parallels conduct that other evidence explicitly links to a defendant' [citations omitted], we have more recently, beginning in 1995, recognized that mirroring hypotheticals often present 'a line that expert witnesses may not cross.' [citations omitted] The danger, as we noted in *Boyd*, is that even when an expert does not explicitly identify the defendant in her answer, her testimony and response to such a hypothetical will suggest that the expert possesses knowledge of the defendant's mental state, which may be used by a jury 'to cure the ambiguity that they face.'" *Id.* at 185.

E. How to Attack: Defense should request pre-trial hearings and file motions in limine to exclude expert testimony in these situations based upon the following:

1. Rule 704(b);

2. Confrontation clause of the United States Constitution

3. Rule 403 prejudicial effect; and

4. In cases where the basis of the testimony is Federal regulations as opposed to statutory issues; ***United States v. Christo*, 614 F.2d 486 (5th Cir. 1980)**, offers grounds for defense challenges.

F. Defense uses of mirroring hypotheticals.

In ***United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997)**, the Court of Appeals held that the trial court erred in excluding under Rule 704(b) testimony of defense expert that the defendant had a weak grasp of bookkeeping principals since such testimony did not necessarily compel the conclusion that the defendant lacked willfulness.

The Court held "a prohibitive opinion or inference under Rule 704(b) is testimony from which it necessarily follows, if the testimony is credited that the defendant did or did not possess the requisite *mens rea*…a contrary conclusion would favor a reading of Rule 704(b) that not only would exclude and expert's opinion as to whether a defendant did or did not have the requisite mental state, but would also exclude an expert's opinion on any matter from which the fact finder might infer a defendant's mental state. This is not what Rule 704(b) says." *Id.* at 1037.

XII. USEFULNESS OF EXPERT TESTIMONY AT SENTENCING.

A. **FED. R. EVID. 1103(d)(3)**: The Federal Rules of Evidence do not apply in sentencing proceedings. Nevertheless, courts can "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. §6A1.3.

B. ***United States v. Follette*, 990 F. Supp. 1172 (D. Neb. 1988)**:

In this case the sentencing court made a downward departure after the defense medical/scientific expert testimony demonstrated that the defendant suffered from a severe mental illness that contributed substantially to her commission of a non-violent offense.

The sentencing court considered the written evaluation of the defendant's psychiatrist, which stated that although Follette's illness would not cause her to jump off a roof without fear or injury, her judgment was, nevertheless, "really diminished."

C. ***United States v. Brown*, 1997 W. L. 786643 (N.D. Ill. Dec. 18, 1997)**:

In this case, the defendant pleaded guilty to one count of conspiracy to pass counterfeit checks. According to the pre-sentence investigation report, Brown suffered from long-term depression, sleep disturbance, loss of appetite, paranoia, and suicidal and homicidal ideation. Brown's psychiatrist reported that Brown's depression caused Brown to "not take into account the potential consequences of his actions" and that it impaired his ability to "differentiate what was real from what was not real."

The court stated that: "While intellectual reasoning constitutes one component of mental capacity, it is not . . . the only measure of whether an individual suffers from 'a reduced mental capacity.' A person afflicted with a psychological or behavioral disorder may exhibit normal intellectual capability, yet not comprehend the consequences of wrongfulness of criminal conduct."

D. ***United States v. Charlesworth*, 2001 U.S. App. LEXIS 3186 (9th Cir. 2001)**:

Defendant challenged his sentence on the ground that the government should not have been able to introduce a Secret Service report regarding the amount of counterfeit currency attributable to the defendant. The court rejected this challenge on the grounds that the Federal Rules of Evidence do not apply at sentencing. The court found that the Secret Service report submitted at the sentencing hearing was corroborated by other independent sources.

XIII. CONCLUSION

As a result of the Supreme Court's decision in *Kumho Tire* and the recent amendments to Rule 702, more testimony is covered by Rule 702 and courts have become more willing to strike an expert's testimony. Most of the case law development on the subject of expert testimony derives from civil cases. While the impact on criminal cases remains somewhat unclear, as judges might be reluctant to strike experts when a person's liberty is at stake, the decisions do sound fair warning for increased scrutiny of experts in criminal cases.

In the years to come, courts will probably use their power even more frequently to exclude expert testimony in the interest of ensuring justice and preserving judicial resources. Therefore, it is clear that counsel should choose an expert early and carefully, giving special consideration to an expert's qualifications in the specific subject area. Counsel should also make it clear to the expert that they must tie their opinion to the facts of the case as closely as possible, avoiding hypothetical situations. Finally, an expert's opinion should be helpful in determining factual issues, not legal ones.

Experts simply cannot be an afterthought. Instead, counsel must integrate their experts into the fabric of their case, keep them informed of factual developments, and advise them to analyze the specific facts. If this is not done, then counsel is placing the case at substantial risk. If the defense's expert is stricken in a criminal environmental case, it could put the client at extreme risk and leave counsel without evidence on crucial aspects of the defense.

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